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Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 17, 2009

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2009 AUG 17 AM 11:01  
CHIEF CLERKS OFFICE

**Re: NUECES COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NO. 5  
TCEQ DOCKET NO. 2009-0678-MWD**

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Request in the above-entitled matter.

Sincerely,

*for* *Vu McWhetter*  
Eli Martinez, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. Box 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

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2009 AUG 17 AM 11:01

TCEQ DOCKET NO. 2009-0913-MWD

CHIEF CLERKS OFFICE

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION BY NUECES	§	
COUNTY WATER CONTROL	§	TEXAS COMMISSION ON
AND IMPROVEMENT DISTRICT	§	
NO. 5 FOR WATER QUALITY	§	ENVIRONMENTAL QUALITY
PERMIT NO. WQ0011583001	§	

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO HEARING REQUEST**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission  
on Environmental Quality (the Commission or TCEQ) and files this Response to Hearing  
Request in the above-referenced matter.

**I. INTRODUCTION**

Nueces County WCID No. 5 (Applicant) has applied for a renewal of TPDES Permit No.  
WQ0011583001, which authorizes the discharge of treated domestic wastewater at a daily  
average flow not to exceed 100,000 gallons per day. The Banquete Wastewater Treatment  
Facility is an activated sludge process plant operated in the extended aeration mode. Treatment  
units include a lift station, bar screen, oxidation ditch, final clarifiers, sludge drying beds and a  
chlorine contact chamber. The facility is in operation.

The effluent limitations in the draft permit, based on a 30-day average, are 10 mg/l  
BOD<sub>5</sub>, 15 mg/l TSS and 4.0 mg/l minimum dissolved oxygen (DO). The effluent shall contain a  
chlorine residual of at least 1.0 mg/l and shall not exceed a chlorine residual of 4.0 mg/l after a  
detention time of at least 20 minutes based on peak flow.

The treated effluent is discharged to Banquete Creek; thence to Petronilla Creek above Tidal Segment No. 2204 of the Nueces-Rio Grande Coastal Basin. The executive director has preliminarily designated the unclassified receiving water uses as no significant aquatic uses for Banquete Creek from the wastewater treatment plant to 0.12 miles downstream, and intermediate aquatic life uses for Banquete Creek 0.12 miles to segment. The designated uses for Segment No. 2204 are intermediate aquatic life uses and contact recreation. The executive director has concluded that the effluent limitations in the draft permit will maintain and protect the existing instream uses.

The plant site is located at the crossing of Banquete Creek and County Road 40, which is approximately 1.25 miles east of Farm-to-Market Road 666 and 0.5 miles south of State Highway 44 near Banquete in Nueces County, Texas.

This permit renewal application was received on September 5, 2008, and declared administratively complete on October 8, 2008. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on October 23, 2008 in the *Caller Times*. The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published on January 6, 2009 in the *Caller Times*. The Executive Director's decision and Response to Comments was mailed April 7, 2009, extending the deadline for requests for reconsideration or contested case hearing thirty calendar days to May 7, 2009.<sup>1</sup> Since this application was administratively complete after September 1, 1999, it is subject to the procedural requirements of House Bill 801 (76th Legislature, 1999).

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<sup>1</sup> 30 TAC §55.201(a)

## II. REQUIREMENTS OF APPLICABLE LAW

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code § 5.556 added by Acts 1999, 76<sup>th</sup> Leg., ch 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TEXAS ADMINISTRATIVE CODE (TAC) § 55.201(d). Under 30 TAC § 55.203(a), an affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include:

- 1) whether the interest claimed is one protected by the law under which the application will be considered;
- 2) distance restrictions or other limitations imposed by law on the affected interest;
- 3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- 4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- 5) likely impact of the regulated activity on use of the impacted natural resource by the person; and

- 6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application. 30 TAC §55.211(c).

The Commission has also set forth specific criteria for judging whether a group or organization should be considered an "affected person." 30 TAC § 55.205(a) states that a group or association may request a hearing if:

- 1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- 2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- 3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

Any group or association which meets all of these criteria shall be considered an "affected person."

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- 1) whether the requestor is an affected person;
- 2) which issues raised in the hearing request are disputed;
- 3) whether the dispute involves questions of fact or law;
- 4) whether the issues were raised during the public comment period;
- 5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's response to Comment;
- 6) whether the issues are relevant and material to the decision on the application; and
- 7) a maximum expected duration for the contested case hearing.

### III. DISCUSSION

#### A. Right to a Contested Case Hearing

Texas Water Code §26.028(d) and 30 TAC §55.201(i) provide that no right to a hearing exists for certain water quality discharge permits. These authorizations include applications to renew or amend a permit if the applicant is not trying to:

- (A) increase significantly the quantity of waste to be discharged;
- (B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;
- (C) any required opportunity for public meeting has been given;
- (D) consultation and response to all timely received and significant public comment has been given; and
- (E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit;

Under the current application, Applicant would not increase the quantity of waste to be discharged from its existing permit, effluent limitations and monitoring requirements would remain the same as the existing permit requirements, opportunity for a public meeting was given, the executive director has filed a response to comments that addresses all timely and significant public comment, and the applicant's compliance history over the last five years is listed as "average." OPIC therefore finds that no right to a hearing exists on the proposed renewal. If the Commission should find otherwise, OPIC offers the following hearing request analysis.

### **B. Affected Person Analysis**

The Office of the Chief Clerk received a timely filed hearing request from Lionel Lopez on behalf of the South Texas Colonia Initiative, Inc. Mr. Lopez states that the interest of the Group is to represent residents who cannot speak for themselves. OPIC finds that the interests the South Texas Colonia Initiative seeks to protect is germane to the organization's purpose.

A group or organization is required by 30 TAC §55.205(a) to identify one or more members who would otherwise have standing to request a hearing in their own right. No such person was identified in the request submitted by Mr. Lopez. OPIC therefore cannot conclude that South Texas Colonia Initiative qualifies as an affected person. However, under 30 TAC §55.205(b), OPIC may request that a group or association provide an explanation of how the group or association meets the requirements for group standing. OPIC requests that any reply by the South Texas Colonia Initiative provide further information showing that at least one member could individually qualify as an affected person. OPIC will reconsider its position on this issue based on any such information provided in a timely filed reply.

### **C. Issues Raised**

Mr. Lopez raises the issues of protection of water quality, human health and the environment, wildlife, and existing uses. Mr. Lopez further states that the discharge route is full of trash and debris. If the discharge route is obstructed, it may not function properly as modeled.

### **D. Issues raised in Comment Period**

Each of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c) & (d)(4), 55.211(c)(2)(A).

### **E. Disputed Issues**

There is no agreement between the Applicant, the Executive Director, and the Requestors on the issues presented above.

### **F. Issues of Fact**

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. *See* 30 TAC §55.211(b)(3)(A) and (B). The issues raised by the requestors concerning protection of water quality, human health and the environment, wildlife, existing uses, and proper function of the effluent route are issues of fact.

### **G. Relevant and Material Issues**

The hearing request raises issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.<sup>2</sup> In order to refer an issue to the State Office of Administrative Hearings (SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.<sup>3</sup> The issues raised by the requestors concerning protection of water quality, human health and the environment, wildlife, existing uses, and proper function of the effluent route are all issues relevant and material to the commission's decision on the proposed permit.<sup>4</sup>

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<sup>2</sup> See 30 TAC §55.209(e)(6)

<sup>3</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

<sup>4</sup> Water Code sections 26.027(a) and 26.003.



#### **H. Issues Recommended for Referral**

If the Commission finds that a right to a hearing exists and that the South Texas Colonia Initiative qualifies as an affected person, OPIC recommends that the following disputed issues of fact be referred to the State Office of Administrative Hearings for a contested case hearing:

- 1) Will the proposed permit protect water quality, human health and the environment, wildlife, and existing uses?
- 2) Is the proposed effluent route adequate to accommodate the proposed discharge?

#### **I. Maximum Expected Duration of Hearing**

Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

#### **IV. CONCLUSION**

OPIC recommends the Commission find that no right to a hearing exists for the proposed permit. OPIC further finds that the South Texas Colonia Initiative does not qualify as an affected person without further information demonstrating that at least one member could individually qualify as an affected person. If the Commission finds that a right to hearing does exist and that South Texas Colonia Initiative has demonstrated affected person status, OPIC

recommends referring the matter to SOAH for an evidentiary hearing on the issues recommended above, with a hearing duration of nine months.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

for By *Vic Martinez*  
Eli Martinez  
Assistant Public Interest Counsel  
State Bar No. 24056591  
(512)239.3974 PHONE  
(512)239.6377 FAX

**CERTIFICATE OF SERVICE**

I hereby certify that on August 17, 2009, the original and seven true and correct copies of the Office of the Public Counsel's Response to Hearing Request were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

for *Vic Martinez*  
Eli Martinez

CHIEF CLERK'S OFFICE

2009 AUG 17 AM 11:02

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

**MAILING LIST**  
**NUECES COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NO. 5**  
**TCEQ DOCKET NO. 2009-0678-MWD**

**FOR THE APPLICANT:**

Emily Rodriguez  
Nueces County WCID No. 5  
P.O. Box 157  
Banquete, Texas 78339-0157  
Tel: (361) 387-7612  
Fax: (361) 387-4144

**FOR THE EXECUTIVE DIRECTOR:**

Anthony Tatu, Staff Attorney  
Texas Commission on Environmental Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-0600  
Fax: (512) 239-0606

Michael Redda, Technical Staff  
Texas Commission on Environmental Quality  
Water Quality Division, MC-148  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4631  
Fax: (512) 239-4430

**FOR OFFICE OF PUBLIC ASSISTANCE:**

Bridget Bohac, Director  
Texas Commission on Environmental Quality  
Office of Public Assistance, MC-108  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4000  
Fax: (512) 239-4007

**FOR ALTERNATIVE DISPUTE  
RESOLUTION:**

Kyle Lucas  
Texas Commission on Environmental Quality  
Alternative Dispute Resolution, MC-222  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4010  
Fax: (512) 239-4015

**FOR THE CHIEF CLERK:**

LaDonna Castañuela  
Texas Commission on Environmental Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-3300  
Fax: (512) 239-3311

**REQUESTER:**

Lionel Lopez, Director  
South Texas Colonia Initiative, Inc.  
4325 Philippine Drive  
Corpus Christi, Texas 78411-5058